IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 440 OF 1991.

1. Shri Dilip Namdeo Gaikwad.
2. Shri Namdeo Shripati Gaikwad. .... Appellants.

(Org.Opponents)

Versus.

1. Shri Ramchandra Dhondu Kshirsagar
2. Shri Vithal Dhondu Kshirsagar.
3. Shri Ulhas Ramchandra Kshirsagar.
4. Shri Pravin Ramchandra Kshirsagar.
5. Shri Nitin Ramchandra Kshirsagar.
6. National Insurance Company Ltd. .... Respondents.

(Org.Applicants)

Mrs.Anita A.Agarwal for the Appellants.
Shri S.R.Singh for the Respondent No.6.

CORAM : ABHAY S. OKA, J.

Date on which the
submissions are heard : 6th June, 2006.

Date on which the
Judgment is pronounced : 23rd June, 2006.

**JUDGMENT.**

1. Heard the learned Counsel appearing for the Appellants and the learned Counsel appearing for the Respondent No.6. The Appellants are the original opponents in a claim petition filed under section 166 of the Motor Vehicles Act, 1988 (hereinafter referred to as "the said Act") by the Respondents Nos.1 to 5 herein. In the said claim petition the Respondents Nos.1 to 5 made an application under section 140 of the said Act

for grant of compensation of Rs.25,000/- on account of no fault liability. By order dated 7th February 1991, the said application was allowed and the Appellant No.2 herein was directed to pay a sum of Rs.15,000/- to the Respondents Nos.1 to 5. The Judgment and order dated 7th February 1991 has been impugned in the present Appeal.

2. The learned Counsel appearing for the Appellants submitted that even according to the Respondents Nos.1 to 5, the cause of death of the deceased was a heart attack. She pointed out that the accident took place on 22nd March 1989 and on 26th June 1989 the deceased suffered an heart attack and died on 9th July 1989. She submitted that there is not even a remote connection between the cause of death of the deceased and the accident allegedly involving the vehicle owned by the Appellant No.2. She submitted that the order under section 140 of the said Act or under section 92-A of the Motor Vehicle Act 1939 could not have been passed by the learned Member of the Tribunal.

3. During the course of the submissions, attention of the learned Counsel for the Appellant was invited to the decision of the Full Bench of this Court in the case of Divisional Controller, MSRTC, Jalgaon v/s. Bapu

Onkar Chaudhari (2003 (4) Mah.L.J. page 990). The view taken by the Full Bench of this Court is that no appeal is maintainable against the order passed under section 140 of the said Act. At this stage Shri S.R.Singh, the learned Counsel appearing for the Respondent No.6 submitted that the decision of the Full Bench is per incuriam inasmuch as the Full Bench has not considered the proviso to section 168 of the said Act. He submitted that the decision of the Full Bench cannot be read as a binding precedent in view of the fact that the Full Bench has not considered a decision of the Apex Court in the case of Chandra Kana Sinha v/s. Oriental Insurance Co.Ltd. and others (2002 ACJ page 210), which holds that an appeal against an order made under section 140 of the said Act is maintainable. Mrs.Agarwal appearing for the Appellants adopted the submissions of Shri S.R.Singh.

4. It is not in dispute that as the order impugned has been passed on an application under section 140 of the said Act, the present Appeal will not be maintainable if the decision of the Full Bench in the case of Divisional Controller, MSRTC, Jalgaon (Supra) is to apply. Therefore, the only question which is to be decided is whether the decision of the Full Bench can be said to be per incuriam as submitted by Shri S.R.Singh,

the learned Counsel appearing for Respondent No.6.

5. The first submission of Shri S.R.Singh is that the proviso to section 168 of the said Act is not considered by the Full Bench. Section 168 reads thus:

> "168. Award of the Claims Tribunal : (1) On receipt of an application for compensation made under section 166, the Claims Tribunal shall, after giving notice of the application to the insurer and after giving the parties (including the insurer) an opportunity of being heard, hold an inquiry into the claim or, as the case may be, each of the claims and, subject to the provisions of section 162 may make an award determining the amount of compensation which appears to it to be just and specifying the person or persons to whom compensation shall be paid and in making the award the Claims Tribunal shall specify the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them, as the case may be:
>
> . Provided that where such application makes

a claim for compensation under section 140 in respect of the death or permanent disablement of any person, such claim and any other claim (whether made in such application or otherwise) for compensation in respect of such death or permanent disablement shall be disposed of in accordance with the provisions of Chapter X.

(2) The Claims Tribunal shall arrange to deliver copies of the award to the parties concerned expeditiously and in any case within a period of fifteen days from the date of the award.

(3) When an award is made under this section, the person who is required to pay any amount in terms of such award shall, within thirty days of the date of announcing the award by the Claims Tribunal, deposit the entire amount awarded in such manner as the Claims Tribunal may direct."

On a plain reading of the decision of the Full Bench, the submission of Shri Singh that the Full Bench has not considered the proviso cannot be accepted. In paragraph

16 of the decision, the Full Bench has specifically referred to the proviso to section 168 and the effect of the said proviso has been obviously considered by the Full Bench. Therefore, the decision of the Full Bench cannot be said to have been delivered in ignorance of the proviso to section 168 of the said Act.

6. On a plain reading of the proviso to section 168 it appears that all that the statute lays down is that when in an Application under section 166 of the said Act, a claim for compensation is also made under section 140 in respect of a death or permanent disability of a person, such claim shall be disposed of in accordance with the provisions of Chapter X of the Act. Chapter X contains sections 140 to 143. Thus the proviso does not have the effect of making an order under section 140 of the said Act an award which was to be treated on par with an award made in a claim petition under section 166 of the said Act.

7. An appeal is always a creation of the statute. The appeal is provided under section 173 of the said Act only against an award. The award as contemplated by section 168 is to be made on an Application for Compensation under section 166 after holding an inquiry. Hence, an order under section 140 of the said Act is not

an award which can be appealed against under section 173 of the said Act. Hence there is no merit in the first submission made by Shri Singh.

8. Now coming to the decision of the Apex Court in the case of Chadra Kana Sinha (supra), the question which fell for consideration before the Apex Court was whether Letters Patent Appeal preferred against the order of the learned Single Judge of the Patna High Court was maintainable before the Division Bench of the said High Court. In the case before the Apex Court the Motor Accident Claims Tribunal passed an order directing the payment of compensation under section 140 of the said Act. The M.A.No.494 of 1996 was filed by the Insurance Company challenging the said order. The said M.A.No.494 of 1996 was allowed by the learned Single Judge of Patna High Court. The said order was challenged before the Division Bench in a Letters Patent Appeal. The Division Bench of the Patna High Court held that Letters Patent Appeal was not maintainable. Considering the provisions of the Letters Patent and the Code of Civil Procedure, 1908, the Apex Court held that Letters Patent Appeal was maintainable. However, the Apex Court has not at all dealt with the question which arises for consideration in the present Appeal. The question is whether an Appeal under section 173 of the

said Act will lie to this Court against an order made under section 140 of the said Act by the Tribunal. Thus it cannot be said that the Full Bench has ignored a binding a precedent of the Apex Court.

9. Thus in my view the decision of the Full Bench is still holding the field. Hence the present Appeal is not maintainable.

10. Hence the following order is passed:

i) The Appeal is dismissed as not maintainable.

ii) Notwithstanding the dismissal of the Appeal, it will be open for the Appellants to take out appropriate proceedings for challenging the impugned order.

iii) There will be no order as to costs.

Judge.